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No. 10-653

IN THE

Supreme Court of the United States

PSKS, INC. D/B/A KAY'S KLOSET...KAY'S SHOES,
Petitioner,

v.

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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January 18, 2011

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RULE 29.6 STATEMENT

Respondent Leegin Creative Leather Products, Inc., now known as Brighton Collectibles, Inc., is wholly owned by Jerry Kohl and Terri Kohl as Trustees of the Jerry and Terri Kohl Living Trust, dated October 18, 2006. Respondent has no parent corporation. No publicly held company owns more than 10% of Respondent's stock.

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BRIEF IN OPPOSITION

INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court held that antitrust challenges to resale price maintenance (RPM) programs must be adjudged under the rule of reason, like other vertical restraints. *Id.* at 881-882. The Court reasoned that RPM, by restricting *intra*brand competition, tended to encourage retailers to make investments that invigorate competition between brands to the benefit of consumers. *Id.* at 889-92. This is procompetitive and beneficial because "the antitrust laws are designed primarily to protect interbrand competition." *Id.* at 895. That RPM could raise retail prices for Respondent's own Brighton-

brand products is no cause for suspicion, because the idea behind RPM is to use higher prices to fund greater investment by retailers in marketing, displays, and customer service. *Id.* at 895-97. The Court also refused to entertain Petitioner's argument that Respondent's RPM program constituted a horizontal restraint, because Petitioner never raised it below. *Id.* at 907-08. The Court vacated the judgment entered below and remanded for further proceedings.

On remand, the district court and the Fifth Circuit faithfully followed the Court's mandate and applied the same rule of reason standard that have for decades been applied to other vertical restraints. This meant that Petitioner had to allege sufficient facts to identify a plausible relevant product market, to plausibly allege that Respondent had power in that market, and to plausibly allege that Respondent's RPM program harmed *inter*brand competition. Petitioner did none of that. Its newly amended complaint was consequently dismissed on the pleadings, and that dismissal was affirmed by the Fifth Circuit.

Now Petitioner argues that the Fifth Circuit's decision contains no less than *seven* conflicts with the decisions of its sister circuits and of this Court. But no such conflicts exist. The Fifth Circuit applied well-established principles of antitrust law over which there is uniform agreement.

Nor do the remand proceedings present any federal question of general importance. Applying *Leegin* as well as the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009), the Fifth Circuit determined that Petitioner failed to plausibly plead sufficient facts to state a claim.

Whether Petitioner's allegations are sufficient in the unique circumstances of this case is not any more worthy of review than the thousands of other dismissals entered by the lower courts each year.

Petitioner argues that the Fifth Circuit imposed a rule of *per se* legality for RPM. Pet. 34. The Fifth Circuit did no such thing. Rather the Fifth Circuit applied the rule of reason to the specific facts before it, and (correctly) concluded that Petitioner had not alleged any facts showing that RPM was being used to anticompetitive effect. It is indisputable that Respondent is a small company in one of the most competitive sectors of the economy: women's fashion accessories. It is difficult to imagine markets more fragmented and competitive than the markets for handbags, jewelry, belts, and other accessories. Countless styles and brands straddling every potential price range are available to consumers in retail outlets ranging from "big box" stores to department stores to small boutiques to online shops. It is thus not surprising that Petitioner could not plausibly allege any harm to interbrand competition.

Petitioner's complaint was conspicuously silent as to Respondent's market share in any market. Instead, Petitioner premised its claims on conclusory and legally untenable allegations such as that Brighton handbags do not compete with other brands of handbags. The only harm to competition alleged was that the price of Respondent's own products were higher than they would have been absent RPM—which *Leegin* explained is not evidence of anything anticompetitive. 551 U.S. at 895-97. Petitioner's complaint was dismissed not because there is something wrong with the rule of reason, but because Petitioner could not plausibly allege an antitrust

market, market power on Respondent's part, or harm to interbrand competition in the particular circumstances of this case.

It is also premature to revisit the standards governing RPM just three years after *Leegin*. The Court then stated that the lower courts could further refine the rule of reason as applied to RPM as they "gain experience considering the effects of these restraints." 551 U.S. at 898. Insufficient time has passed for the lower courts to do so. Tellingly, Petitioner cites not a single other appellate decision applying *Leegin*, let alone one that conflicts with the Fifth Circuit.

The Petition should be denied.

STATEMENT OF THE CASE

1. On remand from *Leegin*, Petitioner filed a second amended complaint ("SAC") attempting to allege that Respondent's RPM program harmed competition under the rule of reason, and alternatively that Respondent's RPM program constituted a *per se* unlawful horizontal restraint.

a. Petitioner alleged two alternative relevant product markets: (1) the "retail market for Brighton's women's accessories," and (2) the "wholesale sale of brand-name women's accessories to independent retailers." SAC ¶ 24; Pet. App. 41a. Petitioner did not allege Respondent's share of either of the alleged markets.

To support the Brighton-only retail market, Petitioner alleged that Brighton products are "unique," "distinct," "differentiated," and "characterized by an inelasticity in demand," because the products "coordinate from head to toe." SAC ¶¶ 16, 25, 26; Pet.

App. 38a, 41a. Petitioner alleged no other facts to show inelasticity of demand or why consumers could not substitute accessories from any of the hundreds of purveyors of fashion accessories.

With regard to the alleged wholesale market, Petitioner alleged Respondent has "market power because it occupies a dominant position as supplier to independent women's specialty stores." SAC ¶ 18; Pet. App. 38a. Petitioner alleged no facts regarding the demand inelasticity of "brand-name" accessories sold to "independent retailers."

Petitioner further alleged that "brand-name women's accessories can be characterized by the wide-spread adoption of practices" that limit interbrand competition. SAC ¶ 32; Pet. App. 43a. Petitioner did not allege what those practices are, whether RPM is one of the practices, or whether the supposed practices were adopted by Respondent or anyone else.

b. As an alternative to its rule of reason theory, Petitioner claimed that Respondent's RPM program constituted a horizontal price-fixing agreement subject to *per se* condemnation. Petitioner alleged that Respondent "formed" a RPM program, known as the "Heart Store" program, in 1998. Petitioner alleged that Respondent then "solicited agreements" from retailers to not discount, "invited" retailers to participate in the Heart Store program, "provided incentives" for them to do so, "required" retailers to execute RPM agreements, and "fixed suggested retail prices." SAC ¶¶ 9-10; Pet. App. 36a.

After forming the Heart Store program, Respondent allegedly "began to enforce the [RPM] Policy with greater regularity" and "made changes" to the RPM Policy" "at the insistence of many of its most

faithful dealers." SAC ¶ 13; Pet. App. 37a. But the only supposed change identified is the allegation that Respondent "invited" some unidentified retailers to a meeting in Hawaii in 2003, where a "consensus of the retailers was reached" and led to a policy whereby Brighton products could be discounted on a customer's birthday. SAC ¶ 14; Pet. App. 37a.

2. The district court dismissed the second amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 2:03-CV-107-TJW, 2009 WL 938561 (E.D. Tex. Apr. 6, 2009); Pet. App. 17a-32a. Petitioner did not request leave to amend. The Fifth Circuit then affirmed. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010); Pet. App. 1a-15a.

a. The Fifth Circuit held that each of Petitioner's alleged product markets excluded products that are reasonably interchangeable with Brighton-brand accessories and henceforth failed the market definition test established in *United States v. E.I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956). *First*, while acknowledging that "[i]n rare circumstances[] a single brand of a product" could constitute a relevant market, the Fifth Circuit held that Petitioners' allegations failed to satisfy the conditions for recognizing such a market. 615 F3d at 418; Pet. App. 9a. *Second*, the Fifth Circuit rejected the alleged wholesale market on four independently sufficient bases, holding that Petitioner: (1) improperly limited the market to the wholesale level when the complaint concerned retail pricing and competition; (2) failed to allege non-conclusory facts that Brighton products are not reasonably interchangeable with non-"brand-name" products; (3) failed to allege non-conclusory

facts showing that independent retailers do not compete with other retailers; and (4) improperly alleged an overly broad and overly vague market that included all "women's accessories" even though different categories of accessories (*e.g.*, handbags and jewelry) are not interchangeable for the same use. 615 F.3d at 418; Pet. App. 9a-10a; *see also* Pet. App. 22a-25a.

Following *Leegin*'s reasoning that abuse of RPM may not be a concern unless the entity has market power, the Fifth Circuit further determined that Petitioner was required to plead market power. 615 F.3d at 418; Pet. App. 10a. Unless a defendant had market power, interbrand competition would prevent it from sustaining artificially high prices above the competitive level. 615 F.3d at 419; Pet. App. 11a. Consumers would simply switch to competing products in response to an anti-competitive price increase. Petitioner failed to provide any non-conclusory allegation that Respondent exercised such market power, or that Respondent's RPM program actually harmed interbrand competition. 615 F.3d at 419; Pet. App. 11a-12a.

Petitioner's allegations of anticompetitive harm, the Fifth Circuit determined, were likewise inadequate. Petitioner's allegation of higher prices for Brighton products did not by itself plausibly plead any anticompetitive effect, because *inter*brand competition would still prevent Respondent from keeping its prices artificially high vis-à-vis its competitors. 615 F.3d at 419; Pet. App. 11a. Nor did Petitioner allege any of the scenarios identified in *Leegin* whereby RPM could be used for anticompetitive ends. *Cf. Leegin*, 551 U.S. at 892-94. In particular, the Fifth Circuit determined that Petitioner failed to

allege that a retailer cartel or a dominant retailer was the source of Respondent's RPM program. 615 F.3d at 419; Pet. App. 12a.

b. Turning to Petitioner's horizontal allegations, the Fifth Circuit determined at the threshold that they were never raised before the appeal to this Court and were therefore barred by the mandate rule. 615 F.3d at 420 & n.6; Pet. App. 13a. In the alternative, the Fifth Circuit also ruled that Petitioner failed to sufficiently allege an horizontal agreement under the *Twombly* standard. *First*, as noted above, Petitioner failed to allege facts showing that "retailers were the source of the price restraint" or that "retailers agreed to RPM among themselves." 615 F.3d at 420; Pet. App. 13a. *Second*, the mere fact that Respondent operated some of its own retail stores did not transmute its otherwise vertical RPM arrangements with retailers into *per se* unlawful horizontal agreements. 615 F.3d at 420-21; Pet. App. 14a-15a.

Petitioner did not request rehearing from the Fifth Circuit, either by the panel or *en banc*.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT REGARDING THE POTENTIAL FOR A MARKET DEFINED BY A SINGLE BRAND

Petitioner pled a relevant market defined solely by the "Brighton" brand, which the Fifth Circuit rejected. Petitioner claims that decision conflicts with other circuit court decisions as well as the decisions of this Court. Pet. 6-10. In fact, there is no conflict.

First, none of the circuit decisions cited by Petitioner approved a product market defined by a single

brand. Most of them in fact affirmatively *rejected* single-brand markets, just as the Fifth Circuit did, for the common-sense reason that almost every branded product is interchangeable with competing products from other brands and therefore belong in the same market with them. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980) ("The evidence mandates the conclusion that the [relevant market] . . . includes all brands of gasoline . . . ."); *Tarrant Serv. Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 614 (6th Cir. 1993) ("This case does not represent one of those circumstances where a single product constitutes a relevant market."); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437-41 (3d Cir. 1997) (rejecting market of Domino's-approved ingredients for excluding other brands of pizza ingredients); *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 690 (8th Cir. 1993) (similar); *Kentucky Speedway v. NASCAR*, 588 F.3d 908, 917-18 (6th Cir. 2009) (similar).

In other cases cited by Petitioner, the court accepted a functional product market that happened to be dominated by *two* merging companies, not markets defined by a single brand or trademark. In *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1032, 1037-41 (D.C. Cir. 2008), for example, the court found the relevant market for merger analysis to be "premium, natural, and organic supermarkets," including Whole Foods, Wild Oats, and other competitors. The court did not in any way find a market that consisted of "Whole Foods brand supermarkets"—the analogue to the market of Brighton products that Petitioner alleged. *See also FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) (market of "sale of consumable office supplies through

office supply superstores" included Staples, Office Depot, and others). In the remaining circuit case Petitioner cites, the court did not even reach the question of whether a single brand market was possible. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 784 (7th Cir. 1999) (market definition not relevant because "only per se violations are charged in this case").

Second, there is no conflict either between the Fifth Circuit and this Court's precedents. It is long settled that a viable product market must include all "commodities reasonably interchangeable by consumers for the same purpose." *du Pont*, 351 U.S. at 395; *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Petitioner relies heavily on *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992), but that case involved after-market repair parts and services for consumers who bought Kodak-brand copiers and physically could not use parts from other copier brands for their Kodak copiers. *See id.* at 457 (observing that "Kodak parts are not compatible with other manufacturers' equipment, and vice versa."). A single-brand market remains untenable as a matter of law under *Kodak* if it excludes products interchangeable for the same use, *Queen City Pizza*, 124 F.3d at 439-40, which is precisely the situation here.

Petitioner fares no better with its reliance on *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). That case did not approve a market defined by a brand or a trademark; rather, consistent with *du Pont*, it defined a market based on a functional product ("intercollegiate football telecasts") that facts showed to be not interchangeable with others. *Id.* at 111-12; *see also Int'l*

Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250 (1959) (market of championship boxing contests).

Third, the Fifth Circuit acknowledged expressly that "in rare circumstances[] a single brand of a product" could constitute a relevant market, but concluded that Petitioner had not plausibly alleged such a market. 615 F.3d at 418; Pet. App. 9a. Thus, the Fifth Circuit did not reject the notion that a single-brand market is sometimes possible. The Petitioner may disagree with the Fifth Circuit's application of the law to the allegations here, but that does justify review by this Court. *See* Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

In any event, it is indisputable that the fashion accessories industry is among the most competitive imaginable, with countless styles and brands from which consumers can choose. Brighton handbags, belts, and sunglasses are plainly "interchangeable by consumers for the same purpose" with the handbags, belts, and sunglasses made by competing manufacturers. *Cf. du Pont*, 351 U.S. at 395. Petitioner's bare allegations that Brighton's products are "distinctive" and "unique" are insufficient, under settled case law, to plead a single-brand market. *See Iqbal*, 129 S. Ct. at 1949 ("'naked assertions' devoid of 'further factual enhancement'" do not state a claim) (citation omitted); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("[C]onclusory assertion that [product] is 'unique' and hence 'not interchangeable with any other program . . .' is insufficient."); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (proposed market implausible where com-

plaint merely alleges that product is "distinct" and has "unique attributes").

The same assertions of product distinctiveness could, after all, be made of many brands from Burger King to Ann Taylor to Mercedes. If that were enough, as one of Petitioner's own authorities observed, then "every manufacturer of a trademarked product has monopoly power over that product. No legal precept stands for this proposition." *Edward J. Sweeney & Sons*, 637 F.2d at 118 (citing *du Pont*, 351 U.S. at 393); *see also Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 43 (2005) (monopoly power cannot be presumed even for patented products). Treating every brand as a monopoly would impose the specter of treble damages on any business that attempts to differentiate its products through trademarks and brand-building. "Sellers may strive to differentiate their products from others in order to compete for the custom of patrons with slightly different needs or tastes. It would be perverse to turn this ordinary attribute of the competitive struggle into a source of illegality." *Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985).

II. THE ISSUES REGARDING WHOLESALE MARKETS DO NOT WARRANT REVIEW

A. The Wholesale Market Issues Are Not Clearly Presented

This case is an inappropriate vehicle for review of Petitioner's arguments regarding defining the market at the wholesale level. Because Petitioner does not seek to challenge all the grounds the Fifth Circuit relied on for its decision, the judgment would stand regardless of Petitioner's arguments. The Fifth Circuit rejected the alleged market of "wholesale sale

of brand-name women's accessories to independent retailers" not only because it was improper to allege a wholesale market to challenge a *retail* pricing restraint, but also on three additional, independently sufficient grounds. As the Fifth Circuit held, Petitioner failed to make any non-conclusory factual allegations to establish that the market should (1) be limited to "brand-name" products, (2) include only "independent retailers," and (3) encompass all kinds of "women's accessories" that are not interchangeable with each other for the same use, like picture frames and jewelry and handbags. 615 F.3d at 418; Pet. App. 9a-10a; *see also* Pet. App. 22a-25a.

To reach Petitioner's challenge, the Court would first need to consider each of these independently sufficient grounds for rejecting Petitioner's proposed market. Petitioner mentions the brand-name issue only in passing in a footnote. Pet. 14 n.2. With respect to independent retailers, Petitioner argues only that the Fifth Circuit did not consider its assertion that Respondent prefers to sell through independent retailers.[1] Pet. 14. That fails to adequately allege that independent retailers are a market onto themselves, and is in any event the kind of case-specific determination that is inappropriate for review by this Court. Most importantly, Petitioner does not challenge at all the Fifth Circuit's conclusion that the category of "'women's accessories' is too broad and vague a definition to constitute a market." 615 F.3d at 418; Pet. App. 10a. That affirmed the district court's determination that the

[1] To the extent Petition claims that the Fifth Circuit neglected to consider any allegation, Petitioner should have petitioned for rehearing. *Cf.* Fed. R. App. P. 35, 40. Petitioner did not do so.

market definition failed "because it groups together products that are not interchangeable with each other" such as picture frames and handbags (Pet. App. 24a), and is alone sufficient to dispose of these allegations of a proposed wholesale market.[2]

B. The Supposed Conflict Regarding Wholesale Markets Is Illusory

Review is not warranted for the further reason that Petitioner's supposed circuit split simply does not exist. Petitioner's proposed wholesale market is inappropriate because the restraint at issue here is *resale* price maintenance, *i.e.*, Respondent's supposed agreements regarding retail prices. The alleged RPM program is not alleged to have affected wholesale prices. Of the cases cited by Petitioner for the supposed "conflict," only two approved wholesale markets, and neither involved restraints that operated only at the retail level. *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011 (9th Cir. 1983) (restraints on wholesale of cosmetic products to retail outlets); *Telecor Comm'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002) (restraint on dealings between service provider and retailer).

The other cases cited by Petitioner in fact rejected the proposed wholesale markets at issue. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1166 (6th Cir. 1984) ("[T]he only relevant product market in this case is the *retail* electrical power market."); *FTC v. H.J. Heinz Co.*, 246 F.3d

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[2] Indeed, Petitioner did not address the "independent retailer" and "women's accessories" issues even in its Fifth Circuit briefing, in spite of the fact that the district court had expressly based its rejection of Petitioner's wholesale market on those factors, Pet. App. 22a-25a.

708, 719 n.17 (D.C. Cir. 2001) ("the wholesale market cannot be separated out for analysis"); *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1345 (11th Cir. 1987) (similar). Petitioner's remaining authorities did not even present any analysis of market definition. *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984) (no detailed market definition analysis); *Schuylkill Energy Res., Inc. v. Pa. Power & Light*, 113 F.3d 405 (3d Cir. 1997) (dismissal on antitrust injury grounds with no analysis of market definition).

Petitioner now argues about whether retailers could switch to other wholesale suppliers if a "wholesale monopolist" raised its prices (Pet. 15), but there is no allegation here that Respondent's RPM program affected wholesale prices. Petitioner cites no authority from any circuit for the proposition that a restraint on *retail* prices should be analyzed at the wholesale level.

III. THE ISSUES REGARDING MARKET POWER DO NOT WARRANT REVIEW

A. Petitioner Has Waived Its Argument Against the Market Power Requirement

Petitioner now argues that "direct" demonstration of anticompetitive effects obviates any need to show power in a relevant market (Pet. 19), but this argument was not properly raised below and has therefore been waived. In the district court and in its opening brief in the Fifth Circuit, Petitioner argued only that pleading "the existence of the agreement and the scope of its operation," without more, sufficed to state a rule of reason violation. *E.g.*, 615 F.3d at 417; Pet. App. 7a (noting Petitioner's argument). It was not

until its reply brief in the Fifth Circuit that Petitioner urged, for the first time, a "quick look" rule of reason standard, under which a direct demonstration of anticompetitive effects sufficed to establish a restraint's unreasonableness without detailed analysis of market definition and market power. *See* Reply Brief of Appellant at 11, *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 09-40506), 2009 WL 6479733.

That was not enough to preserve the argument, because it was improper to raise an argument not made in the district court or to raise it for the first time on reply. *Cf. Ntakirutimana v. Reno*, 184 F.3d 419, 429 n.19 (5th Cir. 1999) (arguments not raised in the district court deemed waived); *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) ("Arguments raised for the first time in a reply brief are generally waived."); *see also* Appellee's Answering Brief at 20-21, *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 09-40506), 2009 WL 6479732 (arguing waiver).[3]

B. There Is No Conflict Regarding the Fifth Circuit's Market Power Requirement

Petitioner's challenge to the market power requirement does not warrant review for the further reason that the conflicts asserted by Petitioner do not exist. There is no conflict between the Fifth Circuit's decision and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Nor is there a circuit split over

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[3] An *amicus curiae* tried to advance the "quick look" argument in the Fifth Circuit, but *amicus* could not preserve an argument waived by the party it supports. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006).

whether *Indiana Federation* applies to vertical restraints generally, let alone to RPM specifically.

First, the Fifth Circuit's decision is perfectly consistent with *Indiana Federation*, which held in the context of a horizontal restraint that detailed analysis of market definition and market power may be obviated by proof of "actual detrimental effects, such as a reduction of output," 476 U.S. at 460-61. Here, the Fifth Circuit did analyze at length Petitioner's allegations of anticompetitive effects, and rejected them because they were not adequately pled. 615 F.3d at 419-21; Pet. App. 11a-12a. Thus, even assuming that *Indiana Federation* applies to vertical restraints, there is no conflict because Petitioner simply failed to plausibly allege anticompetitive harm. Petitioner's disagreement with the Fifth Circuit's fact-bound analysis of its allegations does not warrant review by this Court.

Just as importantly, the Fifth Circuit's analysis was sound. Petitioner alleged higher prices for Brighton products and reduced price competition among Brighton dealers. SAC ¶ 27; Pet. App. 41a. The Fifth Circuit found that inadequate to plead anticompetitive harm (615 F.3d at 419; Pet. App. 11a) for the same reason that *Leegin* rejected Respondent's reliance on alleged increases in intrabrand prices: "[Petitioner] is mistaken in relying on the pricing effects absent a further showing of anticompetitive conduct." *Leegin*, 551 U.S. at 895. *Leegin* explained that the entire point of RPM is to reduce price competition among a brand's retailers to encourage retailers to invest in "fine showrooms,"[4]

[4] Petitioner lost its status as a featured "Heart Store" for the Brighton brand because its showroom was "unattractive." *Leegin*, 551 U.S. at 884.

"a reputation for selling high-quality merchandise," and other forms of non-price competition. *Id.* at 891. Thus, higher *intra*brand prices caused by RPM are no more suspicious than higher prices caused by "better inputs that improve product quality" or by the use of "an advertising agency to promote awareness" of the product. *Id.* at 896. Certainly, Petitioner has not cited any case from any circuit suggesting that a vertical restraint violates the rule of reason merely because it led to higher prices for the defendant's own products.

Because "the antitrust laws are designed primarily to protect interbrand competition," *Leegin*, 551 U.S. at 895, Petitioner would need to plausibly allege that Brighton's RPM policies led to reduced interbrand competition and higher interbrand prices to plead a direct anticompetitive effect. But as the Fifth Circuit correctly held, "nothing in [the] complaint plausibly alleges harm to interbrand competition." 615 F.3d at 419; Pet. App. 12a. Petitioner made only a throw-away, conclusory allegation regarding interbrand competition among manufacturers, alleging that women's accessories "can be characterized by the wide-spread adoption of practices that have the effect of limiting price competition among competing brands." SAC ¶ 32; Pet. App. 43a. Petitioner identified neither what those practices were, nor which manufacturers adopted them, nor how they limited interbrand price competition—much less how Respondent's RPM policies had anything to do with those unidentified practices. *See Twombly*, 550 U.S. at 555 ("labels and conclusions" not sufficient to state an antitrust violation).

Second, no intercircuit conflict exists regarding the application of *Indiana Federation* to vertical re-

straints, because even the cases Petitioner cites (Pet. 20) required a showing of market power, just as the Fifth Circuit did. *See K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (plaintiff must "establish that the defendants possess the requisite market power and thus the capacity to inhibit competition market-wide") (citation omitted); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987) (plaintiff must "prove the defendant's substantial market power in a relevant market") (citation omitted). The third case Petitioner cites, *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440 (9th Cir. 1988), did not even involve a vertical restraint; it concerned a horizontal boycott.[5]

Third, the Fifth Circuit was correct to require a showing of market power in the context of this case. The Court recognized long ago that interbrand competition "provides a significant check" on a manufacturer's ability to use vertical restraints in an anticompetitive manner. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977). Consumers dissatisfied with a defendant's offering have "the ability . . . to substitute a different brand of the same product," *ibid.*, for example by buying one of the countless other brands of belts available rather than a Brighton belt. Thus, even Petitioner's own authority recognized that market power is an "essential" requirement in a vertical case, because "[f]irms lacking market power . . . cannot adopt restraints that have anticompetitive effects . . . ." *Ryko Mfg.*, 823 F.2d at 1231. Indeed, *Leegin* equated the rule of reason with "an inquiry into market power and

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[5] In any event, in *Oltz* the Ninth Circuit found that the defendants did have power in the relevant market. 861 F.2d at 1446-47 (defendants had "overwhelming majority of the market").

market structure designed to assess [a restraint's] actual effect," 551 U.S. at 885-86, reasoning that anticompetitive use of RPM "may not be a serious concern unless the relevant entity has market power," *id.* at 898.

C. There Is No Conflict Regarding "Direct" Proof of Market Power

Petitioner also asserts an inter-circuit conflict as to whether conclusory allegations of "product differentiation, demand inelasticity for its brand, and low cross-elasticity for other brands" suffice to plead market power. Pet. 15-18. However, not a single one of the authorities cited by Petitioner found market power sufficiently pled by a sheer allegation of "product differentiation" or "demand inelasticity." To state an allegation of "inelasticity" is nothing more than reciting the conclusion of the *du Pont* interchangeability test. *Cf. du Pont*, 351 U.S. at 395. Petitioner's assertions are nothing more than "labels and conclusions" that do not suffice to plead a plausible antitrust violation. *Twombly*, 550 U.S. at 555; *see also Tanaka*, 252 F.3d at 1063; *Jacobs*, 626 F.3d at 1338.

Petitioner's argument is just a repackaging of its single-brand market theory, *i.e.*, that other brands of handbags, belts, picture frames, and jewelry are not interchangeable with Brighton products. *See supra* at 11. The mere fact that Brighton products are "differentiated" in appearance and styling is not enough to plead market power. Every trademarked product is differentiated from other trademarked products. That is the entire point of branding. If Petitioner has its way, then every producer of a trademarked good would be considered a monopolist.

But as the Court recognized long ago, the power that "automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." *du Pont*, 351 U.S. at 393. Petitioner did not plead sufficient facts to show Respondent's power over any interbrand market, and the Fifth Circuit was right to find a failure to plead market power.

Petitioner also appears to argue that a defendant's "control over prices" suffices to plead market power. Pet. 17. There is no circuit split on whether such allegations suffice to plead market power in the context of a *vertical* restraint. The Court has expressly "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin*, 551 U.S. at 888. None of the supposedly conflicting authorities cited by Petitioner addressed vertical restraints. Petitioner's cases instead addressed horizontal restraints or unilateral conduct. *See Dimmit Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516 (1982) (monopolization claim based on unilateral price-setting aimed at horizontal competitors); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999) (horizontal boycott and monopolization); *In re Brand Name Prescription Drugs*, 186 F.3d at 783-784 (horizontal price-fixing); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000) (facially vertical restraint deemed horizontal group boycott); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (horizontal information exchange and price coordination). Three other cited cases assessed market power by analyzing barriers to entry, a factor not alleged here. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984-989 (D.C. Cir. 1990) (no market power due to low barriers to entry); *Ball Memorial*

Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334-36 (7th Cir. 1986) (similar); *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194, 209-11 (3d. Cir. 1994) (analyzing entry barriers and technological progress).

The fundamental differences between the antitrust analysis of horizontal and vertical cannot be ignored. As noted above, *Leegin* emphasized that anticompetitive use of RPM may not be a serious concern unless the defendant has market power. 551 U.S. at 898. Control over prices of a defendant's own products, of course, is the very essence of RPM, because such control can invigorate *inter*brand competition. *Id.* at 890-892. Vertical restraints are perfectly consistent with vigorous interbrand competition; that is why they are judged under the rule of reason. *GTE Sylvania*, 433 U.S. at 52 n.19 ("The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer."). The Court's vertical restraint jurisprudence thus forecloses Petitioner's argument that vertical restrictions over *intra*brand prices constitutes independent evidence of market power. [6]

D. The Market Power Issues Are Not Ripe For Review

Even if there are questions regarding how the market power requirement applies to RPM cases, review at this juncture is premature given the paucity of cases applying *Leegin* to RPM practices.

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[6] Petitioner also claims that the Fifth Circuit "conflicts" with several scholarly articles that purportedly suggest alternatives to market definition analysis in evaluating a defendant's market power. Pet. 18. "Conflict" with an academic publication does not satisfy the Court's established standards for exercise of its certiorari jurisdiction. *Cf.* Sup. Ct. R. 10.

Allowing more time for RPM jurisprudence to percolate in the lower courts would produce a more fulsome body of cases and analyses for the Court to draw on if the need arises to clarify the law. As Petitioner's own authorities demonstrate, the lower courts, applying the same market power requirement to vertical non-price restraints, have produced a considerable body of decisions informed by more supple records than Petitioner's bare-bones complaint. *See, e.g.*, *Ryko Mfg.*, 823 F.2d 1215; *K.M.B. Warehouse*, 61 F.3d 123. Time should be allowed for similar jurisprudential development before the Court sets out more detailed standards for RPM.

IV. PETITIONER'S NEW HORIZONTAL CLAIMS DO NOT WARRANT REVIEW

The Fifth Circuit provided two independent grounds for dismissing Petitioner's new allegations of horizontal conduct. *First*, the Fifth Circuit held that these claims, never raised in prior proceedings before *Leegin*, were barred by the mandate rule and deemed waived. *Second*, the Fifth Circuit held that the claims failed of their own accord because Respondent's dual distribution arrangement did not convert its RPM program from a vertical to a horizontal restraint, and because Petitioner failed to satisfy the *Twombly* standard for pleading horizontal agreement. 615 F.3d at 420-21; Pet. App. 13a-15a.

Petitioner claims the Fifth Circuit's decision conflicts with its sister circuits on each issue. That is incorrect. Regardless, the Fifth Circuit's fact-bound analysis of these issues do not raise any significant questions that warrant review. Moreover, this case is a poor vehicle for reviewing any of these issues because, to affect the outcome, the Court would need

to grant review on both the waiver issue and the merits of Petitioner's horizontal theories.

A. There Is No Inter-Circuit Conflict Regarding the Mandate Rule

Petitioner never asserted an horizontal agreement until its briefing before this Court in *Leegin*. The Court expressly declined to consider that claim because it had not been raised below. 551 U.S. at 907-08. On remand, the district court and the Fifth Circuit found the issue waived under the mandate rule, which "precludes litigation of waived issues on remand because they were never raised in the district court" before appeal. 615 F.3d at 420; Pet. App. 13a; Pet. App. 26a-27a.

Petitioner has cited no authority, much less demonstrated any intercircuit conflict, to support its proposition that a civil plaintiff may assert upon remand new claims it could have presented, but did not previously present, in the district court. Petitioner relies on a series of criminal sentencing decisions: *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 1995); *United States v. Atehortva*, 69 F.3d 679 (2d Cir. 2002); *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999); and *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997). These cases suggest that a criminal defendant may sometimes raise new *arguments* in re-sentencing proceedings upon remand if there was no incentive to raise them prior to the appeal. But these cases involve concerns unique to criminal re-sentencing proceedings. *Cf., e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("various protections that apply in the context of a criminal trial do not apply in a [civil proceeding]"); 18B Charles Alan Wright et al., *Federal Practice & Procedure* § 4478.3 (2d ed. 2002) ("Criminal sentenc-

ing appeals have . . . a specialized set of mandate issues."). They present an analytically distinct issue from whether a new civil *claim* can be raised for the first time after appeal.

Indeed, in civil antitrust cases, the lower courts have consistently barred new claims and theories on remand from this Court. In the seminal *GTE Sylvania* case, after the Court held that vertical non-price restraints were subject to the rule of reason, the plaintiff attempted to replead its claim as horizontal in the hope of resurrecting the *per se* standard this Court rejected. The Ninth Circuit barred the new horizontal claims as waived. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1136 n.6 (9th Cir. 1982). Likewise, when the plaintiff tried something similar after reversal by this Court in *Omni Outdoor Advertising*, the Fourth Circuit held that the plaintiff "cannot turn back the clock and resuscitate the monopolization . . . theories that it earlier chose not to pursue." *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505-06 (4th Cir. 1992). Notably, the Ninth and Fourth Circuits generally permit new arguments on remand in resentencing proceedings, which further demonstrates that Petitioner's sentencing cases are distinguishable and irrelevant for the issue here. *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) (permitting resentencing *de novo*); *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 n.4 (1995) (similar).

The civil cases Petitioner does cite are notably off point, because they addressed either issues that were preserved or could not have been advanced in a prior proceeding. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), considered whether a defendant could raise on appeal an issue that it

preserved in the district court but did not raise in a prior appeal. *Id.* at 738-41. In *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304 (6th Cir. 1988), the issue was whether a defendant could raise a defense that it could not have presented in a prior proceeding. *Id.* at 309-10.[7] Likewise, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), declined to find waiver where the defense at issue had not been available during the pendency of trial court proceedings. *Id.* at 142-44. The other authorities cited alongside *Butts* apply similar standards and are inapposite for the same reason. *See* Pet. 25 n.8.

Petitioner does not, and cannot, contend that it had been previously unable to allege *per se* illegal horizontal agreements before the *Leegin* decision. The *per se* standard for horizontal agreements has been the law since at least *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216-17 (1940). The Federal Rules of Civil Procedure expressly allow pleading of alternative and even inconsistent theories in order to facilitate "a full presentation of all relevant facts and legal theories at trial and the final settlement of disputes on their merits." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1282 (3d ed. 2004); Fed. R. Civ. P. 8(d)(3). Petitioner chose not to do so, and must live with the consequences. *Cf. Leegin*, 551 U.S. at 907-08. Otherwise plaintiffs would be able to assert and try alternative claims seriatim. "Trying cases one claim at a time is both unfair to the opposing party and ineffi-

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[7] The block quote from *Loudermill* Petitioner featured (Pet. 27) actually addressed the applicability of collateral estoppel and *res judicata*, which is irrelevant here. *Loudermill*, 844 F.2d at 309.

cient for the judicial system." *Omni Outdoor Adver.*, 974 F.2d at 505-06.

In any case, as noted above, granting review on the waiver issue would not affect the outcome of the case unless the Court also reviewed the sufficiency of Petitioner's horizontal allegations. As discussed below, review is not warranted on that question either.

B. The Dismissal of Petitioner's Horizontal Theories Does Not Warrant Review

1. Petitioner's Reliance on Dual Distribution

Petitioner alleges that Respondent's RPM program constitutes a *per se* unlawful horizontal agreement, because Respondent is a "dual distribution" manufacturer that maintains some of its own retail stores. But there is no more of an intercircuit conflict regarding dual distribution than there is for any other issue Petitioner raises.

As the Fifth Circuit pointed out, its sister circuits have uniformly applied the rule of reason to vertical restraints implemented by a dual distribution manufacturer. 615 F.3d at 421 n.8; Pet. App. 15a. Petitioner fails to cite a single case that applied the *per se* rule merely because the defendant practiced dual distribution. Each and every case that Petitioner claims to conflict with the Fifth Circuit actually treated the challenged restraint as vertical and judged it under the rule of reason, just as the Fifth Circuit did. *See Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982) ("dual distribution systems must be evaluated under the traditional rule of reason standard"); *Ryko Mfg.*, 823 F.2d at 1231 (holding that "the rule of reason applies" in

dual distribution context); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981) (similar); *Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 1992 WL 131169, at *3 (4th Cir. Aug. 6, 1992) (similar); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir. 1984) (similar). *Ryko*, *Hampton*, and *Waffle House* even expressly followed Fifth Circuit precedents. *Ryko*, 822 F.3d at 1231 (citing *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981)); *Hampton*, 1992 WL 131169, at *3; *Waffle House*, 734 F.3d at 711.

In an effort to manufacture a conflict out of thin air, Petitioner claims that the Fifth Circuit "categorically" declared all dual distribution arrangements to be subject to the rule of reason. Pet. 29. Not so. In the Fifth Circuit, "[c]onspiracies between a manufacturer and its distributors are only treated as horizontal . . . when the source of the conspiracy is a combination of the distributors." *Red Diamond*, 637 F.2d at 1004 (citations and quotation marks omitted). But if the restraint is imposed by the manufacturer, it is vertical and the rule of reason applies, just like in the other circuits. *Ibid.* Here, Petitioner "failed to allege that retailers were the source of the price restraint," and the rule of reason therefore governed. 615 F.3d at 420; Pet. App. 13a. Tellingly, none of the decisions cited by Petitioner acknowledges any supposed conflict, because there is no conflict.[8]

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[8] None of the other decisions cited by Petitioner adopted a supposed ironclad, categorical rule either. Pet. 29 (citing authorities from the Second, Third, Sixth, Seventh, and Tenth Circuits). Those decisions recognized that the rule of reason generally applies to restraints imposed in the context of dual distribution, and applied in the specific circumstances of their

The lower courts have uniformly applied the rule of reason for good reasons. A dual distribution manufacturer has the same incentive as any other manufacturer to minimize retailer profit margins, since lower distribution costs reduce consumer prices and tend to lead to increased sales. *Cf. Leegin*, 551 U.S. at 779. Petitioner theorizes that dual distribution diminishes that incentive, but if a dual distribution manufacturer truly wanted to increase its own margins without regard for services or marketing by distributors, it could simply raise its wholesale prices. 615 F.3d at 421; Pet. App. 14a-15a. And if a dual distribution manufacturer truly wanted to insulate its own stores from intrabrand competition, it could raise its wholesale prices to third-party distributors or stop selling to them altogether. When a dual distribution manufacturer uses RPM, it is likely doing so to encourage retailer investments which it hopes will lead to greater consumer demand for its products. *See Leegin*, 551 U.S. at 897. The rule of reason, not *per se* illegality, is the correct standard.

2. Petitioner's Failure to Plead a Retailer Cartel

Even if the mandate rule did not bar Petitioner's new claims, whether the Fifth Circuit correctly applied *Twombly* and *Iqbal* to Petitioner's horizontal cartel allegations does not implicate any issue of special significance. Every day federal courts apply the pleading standards set forth in those precedents, and merely claiming that the Fifth Circuit erred (though Petitioner does not even do that) in applying them to one complaint does not warrant review.

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cases, but none held that a *per se* rule could not apply if the source of the restraint is a horizontal cartel.

To allege an horizontal agreement, Petitioner had to plead facts showing "a preceding agreement, not merely parallel conduct that could just as well be independent action," including who made the agreement as well as "when and where" the agreement took place. *Twombly*, 550 U.S. at 557, 565 n.10. The complaint must plead facts establishing "more than a sheer possibility" of illegality, and is insufficient if it "pleads facts that are 'merely consistent with' the defendant's liability." *Iqbal*, 129 S. Ct. at 1949 (citation omitted). The Fifth Circuit correctly applied *Twombly* and *Iqbal* in determining that Petitioner failed to allege sufficient facts to show that "retailers agreed to RPM among themselves." 615 F.3d at 420; Pet. App. 14a.

None of the cases Petitioner cites conflicts with the Fifth Circuit's holding, because none addressed what factual allegations would suffice to plead an horizontal agreement in these circumstances and because all predate *Twombly*. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966) (appeal from judgment entered after trial); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (similar); *Toys "R" Us*, 221 F.3d at 935 (similar); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (similar). The only case decided on the pleadings, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), addressed not whether an agreement was adequately alleged, but what the liability standard was for the restraint at issue. *Leegin* likewise did not address the standard for pleading a horizontal cartel.

Regardless, Petitioner's own complaint plainly demonstrates its failure to meet those standards. The SAC alleged that it was *Respondent* that

"solicit[ed] agreement" from retailers, "formed" the RPM program, "fixed suggested retail prices," "invited" select retailers to participate, offered "incentives" such as payment terms, "required" participants to execute agreements, and "invited" some retailers to Hawaii in 2003. SAC ¶¶ 9-10; Pet. App. 36a. Thus according to the SAC itself, it was Respondent, not a retailer cartel, that initiated the RPM program and set the prices. Nothing in the SAC "tend[s] to exclude the possibility" that retailers independently agreed with Respondent to resale price maintenance, *Twombly*, 550 U.S. at 554, rather than agreeing among themselves to act in concert.

The first and only alleged communication among retailers took place in 2003, at least five years after the RPM program began in 1998, and even then addressed not retail prices but just a birthday promotion for customers. That allegation does not show any "preceding agreement" among retailers as the impetus for the RPM program. *Twombly*, 550 U.S. at 557. Nor does Petitioner allege "which" retailers, "much less which of their employees," agreed to the supposed horizontal restraints. *Id.* at 565 n.10. There is no allegation that the retailers attending the 2003 meeting competed with one another; obviously, a store selling Brighton products in Florida does not complete with a store in California. *Cf. Leegin*, 551 U.S. at 886 (defining horizontal price-fixing as "horizontal agreements among *competitors* to fix prices") (emphasis added). Petitioner has not even alleged that the birthday promotion had anything to do with its termination or any harm it suffered. What Petitioner has alleged is, at most, a plain vanilla RPM program established by a manufacturer, which as *Leegin* held must be adjudged under the rule of reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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